Malie bin Jolhi (suing as administrator of the estate of Rumi Azzan bin Malie, deceased and for and on behalf of the dependents of the deceased) v Pengarah Jabatan Alam Sekitar (Negeri Sarawak) Kementerian Sains, Teknologi dan Alam Sekitar & Ors

HIGH COURT (KUCHING) — SUIT NO 22–160 OF 2007-I
RAVINTHRAN JC
19 JULY 2010

Evidence — Burden of proof — Person who alleged fact had to prove it — Doctrine of res ipsa loquitur — Whether doctrine applied — Whether burden to prove negligence moved from plaintiff to defendants

Tort — Negligence — Duty of care — Employer's duty to provide safe workplace for its employees — Whether defendants in breach of duty — Whether finding of negligence could be made against defendants — Whether plaintiff could rely on doctrine of res ipsa loquitur

The plaintiff, the father and the administrator of the estate of Rumie Azzan bin Malie ('the deceased'), commenced an action based on the tort of negligence against the Department of the Environment, Sarawak ('the DOE'), the deceased's employer, as the first defendant. The deceased was found dead at the bottom of the DOE building and according to the autopsy report the immediate cause of his death was injuries caused by falling from a height. At the inquest the coroner had returned an open verdict which meant that there was no factual basis to make a finding of a specific verdict such as suicide or murder. It was the plaintiff's case that since the death of the deceased was caused by a fall from the ninth floor of his office building, the DOE was in breach of its duty to provide a safe workplace for its employee. The plaintiff also pleaded that the second and third defendants were vicariously liable. However, as the plaintiff had no knowledge of the actual circumstances surrounding the death of the deceased he sought to rely on the doctrine of res ipsa loquitur and argued that the defendants bore the burden of proving that the death of the deceased was not caused by negligence. The defendants denied that they had breached their duty to provide a safe workplace. The director of the DOE at the material time testified that the deceased shared a cubicle with about ten other officers on the ninth floor and that the DOE building had been certified fit before it was leased by the government. The defendants raised a preliminary issue that in a claim in tort against the government, the officer of the government who was responsible for the alleged tortuous act had to be made a party and his liability had to be

established before the government was made vicariously liable. The defendants thus argued that since the plaintiff did not personally name any officer of the DOE as a party to this action his claim should fail. It was the plaintiff's case that although he did not cite the director of the DOE as a party, he had submitted during cross-examination and in his written submission that the said director was responsible for the death of the deceased.

Held, dismissing the claim with costs:

(1) Although the plaintiff suggested that the director of the DOE at the material time was responsible for the death of the deceased he had failed to join him as a defendant. Since in a claim in tort against the government, the officer of the government who was responsible for the negligence had to be joined as a party, on this ground alone the plaintiff's instant claim should fail (see paras 5–6).

(2) In order to rely on res ipsa loquitur the plaintiff had to prove that it was more likely that the effective cause of death was some act or omission of the defendants and that this act or omission constituted a failure to take proper care of the deceased's safety. However, the plaintiff had no evidence that the DOE building was unsafe, in that employees could simply fall out of the building through no fault of their own. By all accounts there was no case for arguing that the likely cause of death was the fact that the employer did not provide a safe workplace. In the instant case, the mere discovery of the body of the deceased at the bottom of the building without anything more to impute negligence on the part of the defendants could not give rise to the application of the doctrine of res ipsa loquitur. There was no reasonable evidence of negligence which entitled the plaintiff to invoke the doctrine of res ipsa loquitur. In any case, even if the doctrine of res ipsa loquitur applied, the defendants had rebutted the presumption that the building was an unsafe workplace (see paras 16–19).

(3) As the doctrine of res ipsa loquitur did not apply the burden to prove negligence, which was the plaintiff's pleaded case did not shift but remained with the plaintiff. The plaintiff failed to adduce any evidence to establish that the first defendant failed to provide a safe workplace and thus failed to prove his case on a balance of probabilities (see paras 20–21).

[Bahasa Malaysia summary

Plaintif, bapa dan pentadbir kepada harta pusaka Rumie Azzan bin Malie ('si mati'), memulakan tindakan berdasarkan tort kecuaian terhadap Jabatan Persekitaran, Sarawak ('DOE'), majikan si mati, sebagai defendan pertama. Si mati dijumpai mati di bahagian bawah bangunan DOE dan mengikut laporan autopsi sebab langsung kematiannya adalah kecederaan yang disebabkan jatuh

daripada ketinggian tersebut. Pada masa inkues koroner telah memberikan keputusan terbuka yang bermaksud bahawa tiada asas fakta untuk membuat dapatan keputusan spesifik seperti bunuh diri atau pembunuhan. Ia adalah kes plaintif bahawa memandangkan kematian si mati disebabkan jatuh daripada tingkat kesembilan bangunan pejabatnya, DOE adalah memungkiri tugasnya untuk memperuntukkan tempat kerja selamat untuk pekerja-pekerjanya. Plaintif juga memplid bahawa defendan-defendan kedua dan ketiga adalah bertanggungjawab secara vikarius. Walau bagaimanapun, memandangkan plaintif tidak mempunyai pengetahuan mengenai kejadian sebenar melingkungi kematian si mati dia memohon untuk bergantung kepada doktrin res ipsa loquitur dan berhujah bahawa defendan-defendan menanggung beban untuk membuktikan bahawa kematian si mati bukan disebabkan kecuaian. Defendan-defendan menafikan bahawa mereka telah memungkiri tugas mereka untuk memperuntukkan tempat kerja yang selamat. Pengarah DOE pada masa material memberi keterangan bahawa si mati berkongsi kubikel dengan sepuluh pegawai yang lain di tingkat ke-sembilan dan bahawa bangunan DOE telah diiktirafkan sebagai selamat sebelum ia disewakan oleh kerajaan. Defendan-defendan membangkitkan isu permulaan bahawa di dalam tuntutan tort terhadap kerajaan, pegawai kerajaan yang bertanggungjawab untuk tindakan tort yang didakwa mesti dijadikan pihak dan liabilitinya mestilah dibuktikan sebelum kerajaan dibuat sebagai bertanggungjawab secara vikarius. Defendan-defendan oleh itu berhujah bahawa memandangkan plaintif tidak secara peribadi menamakan mana-mana pegawai DOE sebagai pihak kepada tindakan ini, tuntutannya patut gagal. Ia adalah kes plaintif bahawa walaupun dia tidak menyatakan pengarah DOE sebagai pihak, dia berhujah semasa pemeriksaan balas dan di dalam pengemukaan bertulisnya bahawa pengarah tersebut bertanggungjawab bagi kematian si mati.

Diputuskan, menolak tuntutan dengan kos:

(1) Walaupun plaintif mencadangkan bahawa pengarah DOE pada masa material bertanggungjawab ke atas kematian si mati dia gagal untuk memasukkan ia sebagai defendan. Memandangkan dalam tuntutan tort terhadap kerajaan, pegawai kerajaan yang bertanggungjawab untuk kecuaian perlu dimasukkan sebagai pihak, atas alasan ini sahaja, tuntutan plaintif patut gagal (lihat perenggan 5–6).

(2) Untuk bergantung ke atas res ipsa loquitur plaintif terpaksa membuktikan bahawa ia adalah mungkin bahawa sebab efektif kematian adalah sebahagian tindakan atau ketinggalan defendan-defendan dan bahawa tindakan atau ketinggalan ini membentuk kegagalan untuk mengambil langkah berjaga-jaga terhadap keselamatan si mati. Walau bagaimanapun, plaintif tidak mempunyai keterangan bahawa bangunan DOE adalah tidak selamat, di mana pekerja-pekerja boleh jatuh dari bangunan bukan daripada kesilapan mereka sendiri. Menurut fakta tidak

terdapat kes untuk dihujahkan bahawa kemungkinan sebab kematian adalah fakta bahawa majikan tidak memperuntukkan tempat kerja selamat. Dalam kes ini, penemuan mayat si mati semata-mata di bahagian bawah bangunan tanpa apa-apa yang lebih untuk mengatakan kecuaian di pihak defendan-defendan tidak boleh membangkitkan permohonan untuk doktrin res ipsa loquitur. Tidak terdapat keterangan munasabah mengenai kecuaian yang memberikan hak kepada plaintif untuk membangkitkan doktrin res ipsa loquitur. Walau bagaimanapun, jika doktrin res ipsa loquitur diaplikasi, defendan-defendan telah mematahkah anggapan bahawa bangunan adalah tempat kerja yang tidak selamat (lihat perenggan 16–19).

(3) Memandangkan doktrin res ipsa loquitur tidak mengaplikasikan beban untuk membuktikan kecuaian, yang mana adalah kes plid plaintif tidak bertukar tetapi kekal bersama plaintif. Plaintif gagal untuk mengemukakan apa-apa keterangan untuk membuktikan bahawa defendan pertama gagal untuk memperuntukkan tempat kerja selamat dan oleh itu gagal untuk membuktikan kesnya atas imbangan kebarangkalian (lihat perenggan 20–21).]

Notes

For cases on duty of care, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 963–1011.

For cases on person who alleged fact had to prove it, see 7(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 591–594.

Cases referred to

Cassell & Co Ltd v Broome and another [1972] AC 1027, HL (refd)

Derek Selby, decd, Re [1971] 2 MLJ 277 (refd)

Kerajaan Malaysia & Ors v Lay Kee Tee & Ors [2009] 1 MLJ 1; [2009] 1 CLJ 663, FC (refd)

Lloyde v West Midlands Gas Board [1971] 1 WLR 749 (refd)

MA Clyde v Wong Ah Mei & Anor [1970] 2 MLJ 183, FC (refd)

Mat Jusoh bin Daud v Syarikat Jaya Seberang Takir Sdn Bhd [1982] 2 MLJ 71, HC (refd)

National Chemsearch Corpn (Sea) Pte Ltd & Anor v Hotel Ambassador Malaysia Sdn Bhd [1975] 2 MLJ 193, FC (refd)

Ng Chul Sia v Maimon bt Ali [1983] 1 MLJ 110 (refd)

Rookes v Barnard and others [1964] AC 1129, HL (refd)

Roshairee bin Abdul Wahab v Mejar Mustafa bin Omar & Ors [1996] 3 MLJ 337, HC (refd)

Scott v London and St Katherine Docks Co (1865) 3 H & C 596 (refd)

See Keng Wah v Lim Tew Hong [1957] MLJ 137, HC (refd)

Ting Jie Hoo v Lian Soon Hing Shipping Co [1990] 2 MLJ 56, HC (refd)

Wilsons & Clyde Coal Company, Limited v English [1938] AC 57, HL (refd)

Legislation referred to

Criminal Procedure Code s 337

Dominique Ng (Dominique Ng & Associates) for the plaintiff.
Mohd Taufik (Senior Federal Counsel, Attorney General's Chambers) for the defendants.

Ravinthran JC:

INTRODUCTION

[1] On 17 September 2004, an officer of the Department of the Environment ('DOE') was found dead outside Wisma STA in Kuching, Sarawak. The deceased officer was Rumie Azzan bin Malie. His office was located on the ninth floor of the said building. He was believed to have fallen to his death from 'a height' according to the autopsy report. The plaintiff is the father and administrator of the estate of deceased. The claim is based on the tort of negligence. The plaintiff pleaded that the first defendant was liable in negligence. He also pleaded that the second and third defendants are vicariously liable. Simply put, the case of the plaintiff is that at common law an employer is bound to provide a safe workplace for an employee and that this duty was breached by the first defendant with the unfortunate consequence that the deceased died as a result of falling from the ninth floor of his office building.

TRIAL

[2] The plaintiff and the wife of the deceased gave evidence at the trial. The plaintiff is a retired government servant who had worked as a chief clerk in many government departments over the years. He said that it was the duty of a head of department to provide a safe workplace for his employees. Since his son's death was caused by a fall from the building which is his place of work, he was of the opinion that the defendants were liable. However, he had no knowledge of the actual circumstances surrounding the death of his son. He was informed that his son's body was found at the bottom of the building on that fateful day. A colleague of his son had told him that the deceased was last seen at 11am heading towards the operations room of the DOE office. He said that there was an emergency exit next to this room. However, this colleague was not called as a witness. The plaintiff was aware that his son had received a transfer order posting him to Bintulu. He told the court that it was a promotion for his son as he was appointed to head the Bintulu branch of the DOE. However, when counsel for defendants pointed out that the deceased was still on probation, he agreed that it was a lateral transfer. He also expressed dissatisfaction with the police investigation and the inquest proceedings which failed to determine the manner in which his son came by his death. However,

he was confident that his son would not have committed suicide. In the final paragraphs of his witness statement, he expressed his strong desire to discover the truth surrounding the death of his son. The second witness was the widow of the deceased. She had no knowledge of the actual circumstances surrounding the death of her husband. However, like her father in law, she disagreed that it was due to the negligence of her own husband. Like her father in law, she was also absolutely certain that the deceased would not have committed suicide.

[3] Dr Ab Rahman bin Awang ('DW1') was the director of the DOE in Sarawak at the material time. He told the court that the deceased worked in the enforcement unit of the DOE. He reported directly to the head of this unit. He shared a cubicle with about ten other officers on the ninth floor. DW1 told the court that he is not responsible for the actions of his subordinates and everyone owed a duty to be responsible for their own safety. His said that the DOE building had been certified fit and was issued with an Occupation Certificate before it was leased by the government. He emphatically denied that it was unsafe with broken or cracked windows. He said that the only way anyone could have fallen from the building was through the windows.

PRIMARY FINDING OF FACTS

[4] The parties did not tender any statement of agreed facts. Before I consider the issues in this case, I shall first consider the primary finding of facts that can be made in this case. Unfortunately, not many primary finding of facts can be made in this case. It is common ground that the deceased was an employee of the first defendant at the material time. It is also not disputed that he reported for work at 8am on the day in question. His office was at the ninth floor. He did not have a room to himself. Instead he shared general office space with about ten other officers. At 11.30am the same morning, he was found dead at the bottom of the building. The immediate cause of death was injuries caused by falling from a height. Beyond these facts, there is no evidence at all in respect of the manner in which the deceased died as there were no eyewitnesses. I shall now proceed to consider whether, by inference from primary facts or presumption of law, a finding of negligence can be made against the first defendant. But first I shall consider a preliminary issue that was only raised in the submissions.

PRELIMINARY ISSUE

[5] Counsel for defendants cited the case of *Kerajaan Malaysia & Ors v Lay Kee Tee & Ors* [2009] 1 MLJ 1; [2009] 1 CLJ 663 and submitted that in a claim in tort against the government, the officer of the government who was responsible for the alleged tortious act must be made a party and his liability

must be established before the government can be made liable vicariously as the principal. In the instant case, the plaintiff did not personally name any officer of the DOE as being responsible for the death of his son. The post that DW1 held has been cited as a party but no government officer has been personally joined in the action. During cross-examination and in the written submission, counsel for plaintiff suggested that DW1 was responsible for the death of the deceased, but he failed to join him as a defendant. In the above cited case, the Federal Court said as follows:

> It would be insufficient to merely identify the officer without joining the officer as a party because liability by evidence needs to be established. It is only upon a successful claim against *the officer personally* can a claim be laid against the government. (Emphasis added.)

[6] On this ground alone, the claim of the plaintiff should fail but in the event I am wrong, I shall proceed to consider the case on its merits.

ISSUES

Allegation of murder

[7] It is an undisputed fact that an inquest was held by the coroner to inquire into the cause of death under s 337 of the Criminal Procedure Code. Under s 328, cause of death includes:

> ... not only the apparent cause of death as ascertainable by inspection or post-mortem examination of the body of the deceased, but also all matters necessary to enable an opinion to be formed as to the manner in which the deceased came by his death and as to whether his death resulted in any way from, or was accelerated by any unlawful act or omission on the part of any other person.

[8] After a lengthy inquest hearing during which 31 witnesses gave evidence, the coroner returned an open verdict which means that there was no factual basis to make a finding of a specific verdict such as suicide or murder (see *Re Derek Selby, decd* [1971] 2 MLJ 277 for circumstances in which an open verdict must be made).

[9] During the trial, counsel for plaintiff referred to the allegation of murder made against DW1 during the inquest. However, as counsel for defendants correctly pointed out, the cause of action against the defendants in this suit is that they were negligent as employers as they failed to provide a safe workplace. The essence of the claim of the plaintiff against the defendants is found in paras 6 and 7 of the statement of claim which is reproduced below:

6. In the course of its duty the 1st defendant negligently and carelessly failed to provide a proper and secure place of work for the deceased to enable him to carry out such work and a proper and safe environment of conducting it's operation and provide proper and efficient supervision of the same.

7. The deceased died as a result of the negligence of the first defendant as servant and/or agent of the 2nd and 3rd defendants.

[10] Therefore, this is clearly an action founded on the tort of negligence, ie that at common law, an employer is required to provide a safe workplace for his employees and that the defendants breached that duty. Nowhere in the statement of claim is there a plea that DW1 or any other agent of the defendants murdered the unfortunate deceased by throwing him out of the window. In any event, PW1 did not tender any evidence that the deceased was murdered. The only evidence tendered was that the deceased went to work at the DOE building at 8am on the day in question and at 11.30am he was found dead by a security guard at the bottom of the building. In the premises, the issue whether the deceased was murdered is irrelevant and without evidentiary basis as well.

Common law — duty of employer to provide safe place of work

[11] I shall first direct myself on the duty of an employer to provide a safe workplace as the action is grounded on the defendants' breach of it. In *Ting Jie Hoo v Lian Soon Hing Shipping Co* [1990] 2 MLJ 56 Chong Siew Fai J stated the duty as follows:

> At common law the duty of an employer towards his employees is to take reasonable care for their safety in all the circumstances of the case so as not to expose them to an unnecessary risk: *Wilsons and Clyde Coal Co Ltd v English* [1937] 3 All ER 628; *Joseph Smith (Pauper) and Charles Baker & Sons* [1891] AC 325. The standard of care which the law demands is the care which an ordinarily prudent employer would take in all the circumstances: *Smith v Austin Lifts Ltd and others* [1959] 1 All ER 81.

[12] In *Mat Jusoh bin Daud v Syarikat Jaya Seberang Takir Sdn Bhd* [1982] 2 MLJ 71, Salleh Abbas FJ outlined the duty of an employer towards his workmen as follows:

> The law requires an employer to take reasonable care so to carry on operations as not to subject the persons employed to unnecessary risk, ie a duty not to subject the employee to any risk which the employer can reasonably foresee and which he can guard against by any measure, the convenience and expense of which are not entirely disproportionate to the risk involved. This duty was particularised by Lord Wright in *Wilsons & Clyde Coal Company, Limited v English* [1938] AC 57 at p 58 as threefold: (1) the provision of a competent staff of men; (2) adequate material; and (3) a proper system and effective supervision.

[13] In *Wilsons & Clyde Coal Company, Limited v English* [1938] AC 57 which was cited in the above cases, Lord Thankerton after reviewing leading cases, summarised the stand point of an employee who expects a safe workplace in the following succinct passage:

> It appears clear, then, that, when the workman contracts to do the work, he is not to be held as having agreed to hold the master immune from the latter's liability for want of due care in the provision of a reasonably safe system of working.

[14] Counsel for the defendants has not disputed that the defendants as employers owed a duty of care to provide a safe workplace. However, he denied that the duty was breached. Presumably, since there were no eyewitnesses who could throw any light into the manner in which the deceased came by his death, the plaintiff invoked the doctrine of res ipsa loquitur.

Whether res ipsa loquitur applies in the instant case

[15] Res ipsa loquitur which means 'the thing speaks for itself' is a rule of evidence. Counsel for the plaintiff's argument is that the mere fact that the deceased was working in the DOE building in the employ of the first defendant, means that the burden is on them to explain how he met his death as a result of falling down the said building. The maxim allows for a prima facie finding of evidence of negligence on the part of the alleged tortfeasor. The plaintiff's argument is that the burden to prove that the death of the deceased was not caused by negligence lies on the defendants. In *National Chemsearch Corpn (Sea) Pte Ltd & Anor v Hotel Ambassador Malaysia Sdn Bhd* [1975] 2 MLJ 193, the Federal Court cited with approval the following statement on the doctrine of res ipsa loquitur from the judgment of Megaw LJ in *Lloyde v West Midlands Gas Board* [1971] 1 WLR 749:

> I doubt whether it is right to describe res ipsa loquitur as a 'doctrine'. I think it is no more than an exotic, though convenient, phrase to describe what is in essence no more than a common sense approach, not limited by technical rules, to the assessment of the effect of evidence in certain circumstances. It means that a plaintiff prima facie establishes negligence where: (i) it is not possible for him to prove precisely what was the relevant act or omission which set in train the events leading to the accident; but (ii) on mere evidence as it stands at the relevant time it is more likely than not that the effective cause of the accident was some act or omission of the defendant or of someone for whom the defendant is responsible, which act or omission constitute a failure to take proper care for the plaintiff's safety.

[16] By being unable to call any eyewitnesses or otherwise tender any evidence of negligence against the defendants, the plaintiff's case appears to be entirely dependent on the successful invocation of this rule of evidence. In order to establish prima facie negligence against the defendants, the first

precondition that the plaintiff must satisfy is that it was impossible to prove precisely what was the relevant act or omission which led to the death of the deceased. The second precondition that they must also prove is that it is more likely than not that the effective cause of death was some act or omission of the defendants which act or omission constituted a failure to take proper care of the plaintiff's safety. In the instant case, the bare facts are that the plaintiff was found dead at the bottom of a building which was his workplace. There is no evidence from either the defendants or the plaintiff as to how the deceased met his fate. The pleaded case of the plaintiff is that the defendants failed to provide a safe workplace. Therefore, the plaintiff has only established that the deceased had died and that given the absence of eyewitnesses or other evidence, it is impossible for him to prove what was the relevant act or omission of the first defendant that led to his death. However he has not proved the second precondition, ie that it was more likely than not that the effective cause of death was some act or omission of the defendants which act or omission constituted a failure to take proper care of the deceased's safety. This is because there is no evidence at all that the building in question was unsafe in that employees could simply fall out of the building through no fault of their own. Assuming, for sake of argument, that the deceased and his colleagues were forced to work on the roof top with no safety barriers at the edges, there is probably a case for arguing that the employer did not provide a safe workplace and that this omission was the likely cause of death. In such a situation, there may be a valid ground for invoking the doctrine of res ipsa loquitur. However, that is not the case here. By all accounts, the place of work in question is a normal office with walls and windows.

[17] In other words, there is no reasonable evidence of negligence which entitles the plaintiff to invoke the doctrine of res ipsa loquitur. In the old case of *Scott v London and St Katherine Docks Co* (1865) 3 H & C 596 (cited by our Federal Court in *MA Clyde v Wong Ah Mei & Anor* [1970] 2 MLJ 183), a customs officer was injured by falling sugar bags in a warehouse. Erle CJ held as follows in invoking the doctrine of res ipsa loquitur:

> There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.

[18] One would expect stacked up sugar bags to be secured so as not injure those who are visiting the warehouse. Therefore, it can be argued that there was reasonable evidence of negligence in the absence of an explanation for the said omission. Similarly, a driver who collides into a pedestrian who has sought refuge by standing in the middle of a road divider, must give an explanation under the doctrine of res ipsa loquitur (see *See Keng Wah v Lim Tew Hong*

[1957] MLJ 137). In the instant case, the mere discovery of the body of the deceased at the bottom of the building without anything more to impute negligence on the part of the defendants cannot give rise to the application of the doctrine of res ipsa loquitur. The plaintiff's argument is that because the deceased died as a result of falling down from a great height at his workplace, the defendants are prima facie negligent. The doctrine of res ipsa loquitur is only applicable if the bare facts of this incident tells only one story ie that the defendants were negligent. In *MA Clyde v Wong Ah Mei & Anor*, the Federal Court said as follows in respect of the limited circumstances to which this rule applies:

> Thus, the principal requirement for the maxim to apply is that the mere fact of the accident having happened should tell its own story and raise the inference of negligence so as to establish a prima facie case against the defendant. The story must be clear and unambiguous; if it may tell one of half a dozen stories the maxim is inapplicable.

[19] DW1 testified that DOE building had properly secured windows and walls. There was no plea in the statement of claim or evidence during the trial that the deceased was defenestrated. Therefore, anything could have happened to him. He could have carelessly leaned over the windows and lost his balance. He could even have taken his own life although counsel for plaintiff suggested that it was unlikely. The coroner was unable to determine the manner in which the deceased came by his death. The deceased was a free man in that he was only an employee of the first defendant. He was free to go anywhere he pleased. He was not a prisoner and he was not in the first defendant's physical custody. The duty of the defendants was to provide a safe workplace. The evidence of DW1 that the DOE building was such a place was unchallenged. In the premises, his death under unexplained circumstances cannot give rise to the application of the doctrine of res ipsa loquitur. Even if the doctrine of res ipsa loquitur applied, the defendants have rebutted the presumption that the building was an unsafe workplace. I only need to refer to the following evidence of DW1 which was unchallenged by counsel for the plaintiff to emphasise this point:

> Q: As the head of department, can you tell this Honourable Court what would the government do before a building is occupied to be an office?
>
> A: The government will make sure that the place of work and the building for work are safe for its staffs.
>
> Q: Can you tell this Honourable Court, how about building that place your office in Kuching, Sarawak?
>
> A: The office where I worked in Kuching was a safe place to work. All reasonable steps had been taken to ensure the office space is suitable and safe for DOE's staff to work. If it was not suitable and safe, my department would have not leased the building to be an office and we would not be allowed to occupy it.

Q: What do you mean by all reasonable steps had been taken?

A: Before we decided to rent the office space from the STA, we checked the status and condition of the building and office space. The certificate Occupation was issued by the authority to the owner of the building to occupy the building. There was no crack floors/walls or windows.

Q: Were there any potential danger or risk to staff expected from renting this office space?

A: No, because the office space has no crack on floors, walls or windows. The office space is suitable for DOE's staff who have degrees, diplomas and certificates.

DECISION

[20] The burden to prove negligence which is the pleaded case of the plaintiff lies on them. It does not shift unless res ipsa loquitur is successfully invoked. In this case, for the reasons given earlier, the doctrine of res ipsa loquitur does not apply. In the case of *Ng Chul Sia v Maimon bt Ali* [1983] 1 MLJ 110, Hashim Yeop Sani J, said as follow in respect of a road accident case:

> In an action for negligence the onus of proving the allegation of negligence rests on the person who makes it unless there are disclosed facts which raise a presumption in favour of the plaintiff. The plaintiff must show affirmatively that there has been a breach of a specific or general duty by the defendant and this resulted in the damage to the plaintiff. If he fails to prove this the action must fail.

[21] In the above case, the plaintiff who is the administrator of the estate of the victim failed to adduce any evidence to establish negligence on the part of the defendants. All that he established was that the victim and the pillion rider died and that there was a collision between the motorcycle of the victim and defendant. Similarly in this case, the plaintiff have not proved anything apart from the fact that the deceased died by falling from a height at his workplace. Even if they had successfully invoked the doctrine of res ipsa loquitur, for reasons given earlier, the first defendant has proved that he had provided a safe workplace. Counsel for plaintiff made much of the fact that the windows of the building were 'openable'. I should think that many types of windows can be opened to allow for fresh air or to be used as emergency exits or for other reasons. However, I fail to see why an 'openable' window by itself is a hazard to the occupants of a building. If it is implied in the submission of counsel that such a window was used by the first defendant or his agents for the nefarious purpose of defenestration, there is simply no evidence to support that theory. Counsel for plaintiff questioned DW1 whether the allegation of murder was made against him at the inquest. To my mind, any suggestion of a tortious act apart from negligence must be dismissed outright as the plaintiff cannot depart from his pleaded case in paras 6 and 7. In any event, as I said earlier, the plaintiff did not tender any evidence that DW1 or any of his officers had murdered the

deceased. Counsel for plaintiff also addressed the court on the issue of suicide. He submitted that the deceased could not have died by his own hand. He cited authorities which say that there is a presumption against a finding of suicide. His argument appears to be that since it is nigh impossible that deceased committed suicide, it follows that he was murdered. The issue of whether the deceased committed suicide or whether he died under other circumstances was considered by the coroner. The coroner's finding of open verdict was upheld by the High Court. The issue that requires determination in this action is not whether the deceased committed suicide but whether the first defendant failed to provide a safe workplace. Therefore, it is unnecessary for me to revisit the coroner's finding. For the reasons given above, as the plaintiff failed to prove their case on a balance of probabilities that the first defendant was negligent, I shall dismiss the claim.

DAMAGES

[22] In the event I am wrong in my decision on liability, I shall now give my views on damages. The plaintiff claimed aggravated and exemplary damages. In tort cases, aggravated damages can be included in the category of compensatory damages. In *Cassell & Co Ltd v Broome and another* [1972] AC 1027, (cited in the local case of *Roshairee bin Abdul Wahab v Mejar Mustafa bin Omar & Ors* [1996] 3 MLJ 337) Lord Diplock described it as:

> ... compensation for the injured feelings of the plaintiff where his sense of injury resulting from the wrongful physical act is justifiably heightened by the manner in which or motive for which the defendant did it.

[23] Exemplary damages, on the other hand, are not meant to merely compensate the tort victim but meant to punish the tortfeasor. Its application was discussed in the famous case of *Rookes v Barnard and others* [1964] AC 1129. Exemplary damages is generally discouraged and awarded only in exceptional cases. It is awarded where there is:

(a) oppressive arbitrary or unconstitutional conduct by government servants;

(b) conduct calculated to result in profit; and

(c) express authorisation by statute.

[24] In the instant case, even if the plaintiff succeeded on liability, the first defendant would only have been guilty of not providing a safe workplace which does not fit into any of the above categories. Aggravated damages would not be in order either as it cannot be said that the failure of an employer to provide a safe workplace is an act calculated to humiliate an employee. Aggravated damages would be more suitable for assault and false imprisonment cases. I

shall therefore not make any award for aggravated or exemplary damages. In respect of the dependency claim, PW2 testified that deceased contributed RM500 towards the household expenses and the maintenance of their two children. Given that the deceased was emplaced in the C41 grade with a basic salary of RM1,812 and other allowances which gave him a take home pay of RM2,224, I see no reason not to accept her testimony. As the deceased was only 30 years old, the statutory multiplier is 16 years. Therefore the total general damages for loss of dependency that I shall award is RM96,000. I shall also award bereavement damages of RM10,000. In respect of the funeral expense of RM2,000 and the cost of RM500 to extract the letters of administration, there is no dispute by the defendants. However, the plaintiff omitted to plead the cost of the autopsy report of RM400. In the premises I shall only award RM2,500 as special damages.

[25] In conclusion, as the plaintiff failed to establish liability, I dismiss the claim with agreed costs of RM10,000 in favour of the defendants.

Claim dismissed with costs.

Reported by Kohila Nesan